FILE COPY

TRANSCRIPT OF RECORD

Supreme Court of the United States

October Term, 1959

No. 84

SECRETARY OF HEALTH, EDUCATION AND WELFARE, APPELLANT,

vs.

WILLIAM HESTOR.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

Filed April 24, 1959.

Probable Jurisdiction Postponed June 22, 1959.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 54

FLEMMING, SECRETARY OF HEALTH, EDUCATION AND WELFARE, APPELLANT,

vs.

EPHRAM NESTOR.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA.

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1 (File endorsement omitted in printing)

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1154-58

EPHRAM NESTOR, Bul. Rusky No. 5, Sofia, Bulgaria, *Plaintiff*,

v.

MARION B. FOLSOM, Secretary of Health, Education and Welfare, Health, Education and Welfare Building, Fourth Street and Independence Avenue, S. W., Washington, D. C., *Defendant*.

Complaint for Statutory Review—Filed May 5, 1958

Plaintiff, Ephram Nestor, by his attorneys, complaining of the defendant, alleges as follows:

1. The Court has jurisdiction of this action under 42 U. S. Code, sec. 405(g).

2. The defendant is the Secretary of Health, Education and Welfare. In that capacity he is responsible for the administration of the federal program of old age insurance.

3. The plaintiff presently resides in Bulgaria and until July 1956, resided and worked in the United States.

4. The plaintiff is entitled to insurance benefits pursuant to the provisions of Title II of the Social Security Act. On March 12, 1956, the Department of Health, Education and Welfare issued to the plaintiff a certificate of Social Insurance Award, certifying that he was entitled to such benefits in the amount of $55.60 a month.

5. In July 1956, the plaintiff was deported from the United States. The order of deportation was based upon the provisions of 8 U. S. Code, 1251(a)(6), on the ground of past membership in the Communist Party
2 of the United States.

6. Thereafter, the defendant, acting through his subordinates, and pursuant to the provisions of section 202(n) of the Social Security Act, 42 U. S. Code, sec. 402(n), suspended payment of plaintiff's old-age insurance benefits from and after September, 1956.

7. The alleged conduct of the plaintiff which was the basis for the order of deportation antedated the enactment both of the statute authorizing his deportation and of sec. 202(n) of the Social Security Act.

8. The plaintiff appealed the action of the Secretary suspending his benefits, and on March 13, 1958, final administrative action was taken rejecting his appeal. The plaintiff has exhausted his administrative remedies.

9. The action of the defendant suspending the benefit payments to the plaintiff was illegal and unconstitutional, being, among other things, in violation of Article I, section 9, Article III, section 2, and the First, Fifth and Sixth Amendments of the Constitution.

WHEREFORE, plaintiff prays that the Court adjudge that the suspension of said benefit payments is illegal and unconstitutional and order the defendant to withdraw his order suspending the payment of benefits to the plaintiff, to pay plaintiff accrued benefits as may be due him, plus interest, and all Social Security benefits that may accrue to him in the future, and grant such other and further relief as may be just and proper under the circumstances.

DAVID REIN
David Rein

JOSEPH FORER
Joseph Forer

FORER & REIN
711 14th Street, N. W.
Washington, D. C.

Attorneys for Plaintiff.

(File endorsement omitted in printing)

3 IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Division

Civil Action No. 1154-58

(Title omitted)

Answer—Filed July 3, 1958

COMES Now the defendant, United States of America, by and through its attorneys Oran H. Waterman, James C. Hise and James L. Weldon Jr., Department of Justice, Washington, D.C., and answers the plaintiff's complaint for statutory review as follows:

1. Defendant asserts that inasmuch as the allegations contained in the first paragraph of the complaint state conclusions of law, he is not required to plead responsively thereto, but were he required to reply he would deny the conclusions alleged therein.

2. Defendant admits the allegations contained in paragraph two.

3. Defendant admits that plaintiff presently resides in Bulgaria and avers that he immigrated to the United States in 1913 and lived and worked here until July, 1956 at which time he was deported.

4. Defendant denies the allegations contained in the fourth paragraph of the complaint, except that defendant admits that on March 12, 1956, the Department of Health, Education and Welfare issued to the plaintiff a certificate of Social Insurance Award, certifying that he was entitled to such benefits in the amount of $55.60 a month.

4 5. Defendant admits the allegations contained in paragraph five of the complaint.

6. Defendant admits the allegations contained in paragraph six of the complaint.

7. As to paragraph seven of the complaint, the defendant admits that the proved conduct of record of the plaintiff, which was the basis for his deportation, antedated the

enactment both of the statute authorizing his deportation and of section 202 (n) of the Social Security Act. Defendant further avers that the statute authorizing the plaintiff's deportation and section 202 (n) of the Social Security Act antedated the date of deportation of the plaintiff.

8. Defendant admits the allegations contained in paragraph eight of the complaint.

9. Defendant asserts that inasmuch as the allegations contained in the ninth paragraph of the complaint state conclusions of law, he is not required to plead responsively thereto, but were he required to plead he would deny the conclusions alleged therein.

FOR A FURTHER ANSWER AND BY WAY OF AN AFFIRMATIVE DEFENSE the defendant alleges:

I

The complaint fails to state a claim upon which relief can be granted.

II

The Court has no jurisdiction in this case, except such jurisdiction as is prescribed by section 205 (g) of the Social Security Act as amended, 42 U. S. C. A. section 405 (g), which provides for judicial "review" of the "final decision" upon the administrative record, a certified copy of which is filed as part of this answer pursuant to said section 205 (g) of said Act as Exhibit 1, and which declares the defendant's findings as to any fact to be conclusive if supported by substantial evidence, and which impowers the Court, in an action duly brought thereunder, to enter only such judgment as is specifically provided for in said section of said Act.

5 III

The findings of fact of the Secretary of Health, Education and Welfare are supported by substantial evidence and are conclusive.

WHEREFORE, defendant prays for judgment dismissing the plaintiff's complaint with costs and disbursements, and for judgment in accordance with section 205 (g) of the

Social Security Act, as amended, 42 U. S. C. A. 405 (g), affirming the decision complained of.

ORAN H. WATERMAN
Oran H. Waterman

JAMES C. HISE
James C. Hise

JAMES LEE WELDON, JR.
James L. Weldon, Jr.

---

6 (Certificate of service omitted in printing)

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7 **Exhibit to Answer—Excerpts from Administrative Proceedings before the Department of Health, Education and Welfare—Social Security Administration**

(Certification of following transcript omitted in printing)

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8 **Letter Transmitting Denial of Request for Review**

DEPARTMENT OF
HEALTH, EDUCATION AND WELFARE
SOCIAL SECURITY ADMINISTRATION
WASHINGTON, D. C.

Office of Appeals Council

March 13, 1958

In the case of Ephram Nestor, Claimant and Wage Earner
Social Security Account No. 569-12-6491

Mr. Ephram Nestor
Bul. Rusky No. 5
Sofia, Bulgaria

Dear Mr. Nestor:

There is enclosed herewith a copy of the Appeals Council's denial of your request for review of the referee's decision on your claim for old-age insurance benefits under the Social Security Act. Your request for review having

been denied, the referee's decision stands as the final administrative decision on your claim.

Sincerely yours,

JOSEPH E. MCELVAIN
Joseph E. McElvain
Chairman

Enclosure

9

DEPARTMENT OF
HEALTH, EDUCATION AND WELFARE
SOCIAL SECURITY ADMINISTRATION
OFFICE OF APPEALS COUNCIL

Denial of Request for Review—January 31, 1958

In the case of
Ephram Nestor, claimant
Ephram Nestor, Wage Earner
Social Sec. Acc't. No. 569-12-6491

Case No. LA-1156
Claim for old-age Insurance Benefits
Decision of Referee William W. Kapell
Dated January 31, 1958

This case is before the Appeals Council upon request of the claimant for review of the referee's decision rendered in the captioned case. After careful examination of this matter, we are of the opinion that a formal review of the referee's decision would result in no advantage to the claimant; therefore, the Request for Review is hereby denied.

OFFICE OF APPEALS COUNCIL
JOSEPH E. MCELVAIN
Joseph E. McElvain, *Chairman*

Dated: March 13, 1958

12

DEPARTMENT OF
HEALTH, EDUCATION AND WELFARE
SOCIAL SECURITY ADMINISTRATION
OFFICE OF APPEALS COUNCIL

Referee's Decision—January 31, 1958

In the case of
Ephram Nestor
Ephram Nestor
569-12-6491

Case No. LA-1156
Claim for Old-Age Insurance Benefits

This case is before the referee pursuant to the request for hearing filed on November 21, 1956, on behalf of Ephram Nestor, the claimant, because of his dissatisfaction with the determination of the Bureau of Old-Age and Survivors Insurance of the Department of Health, Education and Welfare, issued on October 25, 1956, that his old-age insurance benefits be suspended beginning with the month of September 1956. A hearing, at which claimant's representatives, Barbara B. Nestor, his wife, and Irwin Gostin, his attorney, appearing by Seymour Mandel, co-counsel, appeared and participated in, was held in Glendale, California on December 30, 1957.

Claimant became entitled to old-age insurance benefits in November 1955. The Bureau suspended payment of his benefits in October 1956 because it found that claimant had been deported in July 1957, pursuant to paragraph (1) of section 241(a) of the Immigration and Nationality Act and held that under section 202(n) of the Social Security Act, as amended, payment of his old-age insurance benefits should be suspended effective September 1956.

At the hearing, it was contended on behalf of claimant that he had a vested right to old-age insurance benefits prior to the enactment of the amendment to the Social Security Act, which suspended payment of his benefits, and that, therefore, the amendment deprived him of due process of law. In a Memorandum of Points and Authorities submitted subsequent to the hearing, claimant con-

tends further that the Social Security Act was amended on August 1, 1956, to suspend payment of benefits to individuals deported after September 1, 1956, and that, therefore, the amendment does not apply to claimant because he was deported *before* that date. The general issue to be determined is whether claimant's old-age insurance benefits were properly suspended following his deportation.

13 The pertinent part of section 202(n) of the Social Security Act, provides:

> (1) If any individual is (after the date of enactment of this subsection) deported under paragraph (1), (2), (4), (5), (6), (7), (10), (11), (12), (14), (15), (16), (17), or (18) of section 241(a) of the Immigration and Nationality Act, then, notwithstanding any other provisions of this title—
>
> (A) no monthly benefit under this section . . . . shall be paid to such individual, on the basis of his wages and self-employment income, for any month occurring (i) after the month in which the Secretary is notified by the Attorney General that such individual has been so deported, and (ii) before the month in which such individual is thereafter lawfully admitted to the United States for permanent residence.
>
> (2) As soon as practicable after the deportation of any individual under any of the paragraphs of section 241(a) of the Immigration and Nationality Act enumerated in paragraph (1) in this subsection, the Attorney General shall notify the Secretary of such deportation.

The facts are not in dispute. The record shows that claimant filed an application for old-age insurance benefits on December 2, 1955, and received an award of $55.60 per month effective November 1955. On August 31, 1956, the Bureau received notice from the Attorney General of the United States that claimant was ordered deported to Bulgaria on July 7, 1956, pursuant to paragraph (1) of section 241(a) of the Immigration and Nationality Act.

The Bureau, thereupon, in conformance with section 202(n) of the Social Security Act, as amended, suspended payment of claimant's old-age insurance benefits effective September 1956. Inadvertently, however, the Bureau paid benefits to claimant for the month of September 1956. Notice of the suspension of payment of old-age insurance benefits to claimant was given to Barbara B. Nestor, his wife, on November 15, 1956. Claimant, thereafter, on February 26, 1957, appointed Barbara B. Nestor, his wife, and Irwin Gostin, his attorney, as his representatives to represent him in connection with his claim that payment of his old-age insurance benefits should be resumed.

14 The contention made by claimant that the amendment to the Act, suspending payment of old-age insurance benefits to individuals deported pursuant to the applicable provisions of the Immigration and Nationality Act, is unconstitutional because it deprives him of a vested interest can not be raised in the instant proceeding. It is well settled that an administrative body has no authority to pass upon the constitutionality of the Act which it is called upon to administer. *Engineers* v. *S.E.C.*, 138 F. 2d 936, 952, cert. granted 322 U. S. 723, petition dismissed, 332 U.S. 788; *MacLeod* v. *Fernandez*, 101 F. 2d 934, cert. denied 101 U.S. 561. Nor is there any merit to his contention that claimant acquired a vested right to benefits which rendered the payment thereof immune from the further exercise of the right of Congress to alter, amend, or repeal any provision of the Social Security Act. Payments made as the result of Congressional appropriation have not been thus far construed as contractual in their nature giving use to a vested right. *Norman* v. *B. & O. Ry.*, 294 U. S. 240. Furthermore, the Act provides (Title 42 U.S.C, § 1304): "The right to alter, amend, or repeal any provision of this chapter is reserved to the Congress." See *Mullawney* v. *Folsom*, C.C.H. Fed. Par. 8332, (E.D. N.Y. October 30, 1957).

The case of *Ewing* v. *Gardner*, 185 F. 2d 781, cited by claimant in support of his contention that his claim to benefits became a vested right, is inapposite. In that case plaintiff was held entitled to benefits which had accrued

during a past period when he had satisfied all the statutory requirements for entitlement. In the instant case claimant no longer satisfied all the statutory requirements after his deportation and, accordingly, was not entitled to benefits accruing thereafter. His only vested right was in the benefits accruing prior to his deportation and for which he has been paid.

Claimant is in error when he assumes that section 202(n) of the Social Security Act became effective August 1, 1956, and was applicable only to individuals deported thereafter. The pertinent provisions of that section suspending benefit payments to individuals who are deported, became effective on September 1, 1954, and was made applicable to individuals deported thereafter. Accordingly, there is no merit to claimant's contention that the pertinent provisions of the section are not applicable to him.

It is, therefore, the decision of the referee that the Bureau properly suspended the payment of benefits to claimant, effective September 1956.

William W. Kapell
WILLIAM W. KAPELL, *Referee*

Dated: Jan. 31, 1958

22 DEPARTMENT OF
HEALTH, EDUCATION AND WELFARE
Social Security Administration
Office of Appeals Council

TRANSCRIPT

Case No. LA-1156

In the case of Ephram Nestor (Claimant)

Claim for Old-Age Insurance Benefits

Social Security Account No. 569-12-6491

Hearing Before Referee Held in Glendale, California on December 30, 1957

APPEARANCES:

BARBARA BESS NESTOR, Wife of Claimant
SEYMOUR MANDEL, Attorney

REFEREE: WILLIAM W. KAPELL

Reporter: J. W. Lucy

---

24 **Opening Statement of Referee:**

The hearing will come to order. This is a hearing in Case Number LA-1156, involving the claim of Ephram Nestor; Social Security Account Number 569-12-6491. This hearing is being held at the request of the claimant because of his dissatisfaction with the determination of the Bureau of Old-Age and Survivors Insurance that his old-age insurance benefits be suspended effective September 1956.

* * * * * * * * * * *

My first knowledge of this case came after a request for hearing was filed, and the Bureau of Old-Age and Survivors Insurance sent me the file in the case. The file contains various documents which have been collected by the Bureau up to the present time and the decision of
25 the Bureau. I went through the file and marked, for identification, those documents which I thought relevant to this case and prepared a list of them. They are as follows: Exhibit Number 1 is an Application for Old-Age Insurance Benefits by Ephram Nestor, dated December 2, 1955; Exhibit Number 2 is an Application for Wife's Insurance Benefits by Barbara B. Nestor, dated December 5, 1955; Exhibit Number 3 is the Earnings

Certification, Primary Insurance Amount Determination, which is dated December 8, 1955; Exhibit Number 4 is a Notice of Deportation dated July 7, 1956; Exhibit Number 5 is a Report of Contact by A. V. Gillesby, Field Representative of the Bureau, dated October 1, 1956; Exhibit Number 6 is a letter from Irwin Gostin, attorney, to the San Francisco Area Office of the Bureau, dated November 21, 1956, requesting a hearing before a referee; Exhibit Number 7 is a Determination of Award of benefits, dated March 7, 1956; Exhibit Number 8 is a Certification of Termination of Entitlement or Suspension of Payments by the Bureau dated October 25, 1956; Exhibit Number 9 is an Appointment of Representative dated February 25, 1957; Exhibit Number 10 is a copy of a letter from the Inglewood, California District Office to Mrs. Barbara Bess Nestor notifying her of suspension of her husband's benefits.

• • • • • • • • • • •

26 Referee: There being no objection, the documents identified in the List of Exhibits will be received into evidence as Exhibits Nos. 1 to 10, inclusive. An examination of these documents shows what has happened in this case up to this time. I will summarize them and state the issue to be decided. If the summary and the issue are not as claimant's representatives understand them to be, they will have an opportunity to suggest any changes as soon as I have finished stating them.

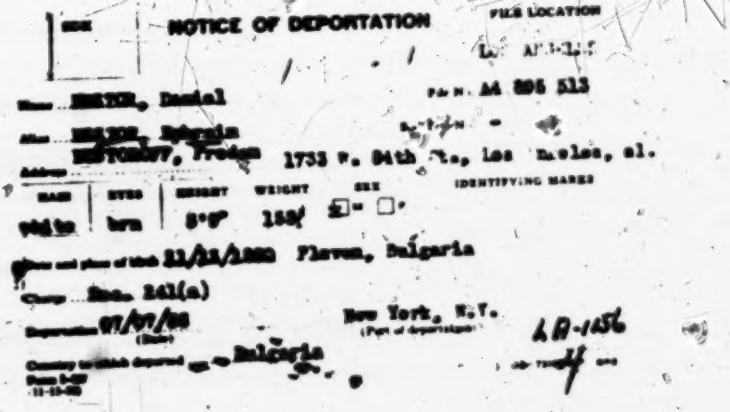
The record shows that claimant, Ephram Nestor, filed an Application for Old-Age Insurance Benefits on December 2, 1955. Effective November 1955 he became entitled to old-age insurance benefits in the amount of $55.60 per month. At the same time his wife, Barbara B. Nestor, also became entitled to wife's old-age insurance benefits in the sum of $27.80 per month. She, thereafter, was notified on October 25, 1956, by the Bureau, that benefit payments to her husband had been suspended beginning with the month of September 1956,

27 because he had been deported to Bulgaria pursuant to Section 241(a) of the Immigration and Naturalization Act, • • •

• • • • • • • • • • •

[48]

Exhibit 4



NOTICE OF DEPORTATION

FILE LOCATION

Name: [redacted], Daniel

File No. A4 895 513

Also known as: [redacted], Bulgrain

Address: [redacted], Predrag 1733 W. 84th Pl., Los Angeles, Cal.

RACE	SEX	HEIGHT	WEIGHT	SEX	IDENTIFYING MARKS
White	Male	5'9"	150#	☒ ☐	

Place and date of birth: 11/13/1920 Pleven, Bulgaria

Charge: Sec. 241(a)

Deportation to: (Date) 07/07/58 New York, N.Y. (Port of departure) LA-1456

Country to which deported: Bulgaria

Form I-257
11-15-56

[49] **Exhibit 5**

REPORT OF CONTACT

Los Angeles 12, Calif.
10-1-56
569-12-6491

Subject Name

U. S. Dept. of Immigration & Naturalization
458 S. Spring St. Los Angeles 12, Calif.

☐ ☒

Mr. Sutton, Chief of Deportation Sec. & Court Division in the year, and that life was deported under paragraph (11) of Section 241 (a).

[redacted]

Agent Signature

Agent Signature

10-1156

Exhibit 5

[51] Exhibit 7

DETERMINATION OF AWARD

919-12-4871

11/13/57 12/2/57

12/31/56 1/1/57

10,976.95 195 10 55.60

B		9/29/56	12/ /57	27.80

Inglewood 1, Calif.

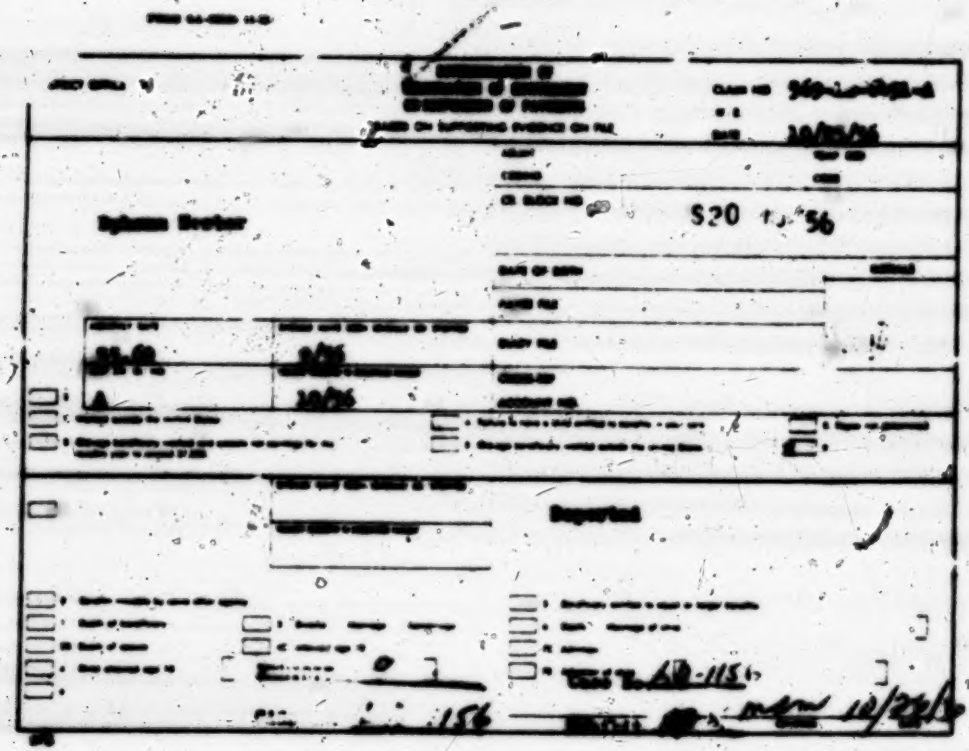
$ yrs. Accepted

R= 7578

A	Ephrem Tarter	11/57	27.80
	3733 W. 62nd St.		
	Los Angeles 43, Calif.		
B	Barbara J. Tarter	11/57	27.80
	Same		

1C 12/2/57

[52] Exhibit 8



55 **Exhibit 10**

353 E. Queen St.

November 15, 1956

Mrs. Barbara Bess Nestor
1733 W. 84th Street
Los Angeles, California

Dear Mrs. Nestor:

This is in reply to your recent letter inquiring as to the non-receipt of your husband's check for October 1956.

The Social Security Law, as amended, provides that where persons receiving benefits have been deported after September 1, 1956, under certain provisions of the Immigration and Naturalization Act, social security payments may no longer be made to these persons. Information received from the Immigration and Naturalization Service indicates that your husband, Ephram Nestor, has been deported under the provisions of the law referred to above.

In view of your husband's deportation, there are no additional payments due under the social security law. In fact, it appears that he actually has been overpaid for the month of September 1956.

If you have any further questions, please feel free to call us.

Sincerely yours,

GEORGE R. KRETS,
District Manager

By .....
KENNETH E. KURTS
Claims Representative

KEK/w

(File endorsement omitted in printing)

56 IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

(Title omitted)

Order Substituting Defendant—September 5, 1958

On motion of the plaintiff, consented to by the parties and by Arthur S. Flemming, Secretary of the Department of Health, Education and Welfare, and it appearing that Marion B. Folsom, the named defendant herein resigned as Secretary of Health, Education and Welfare during the pendency of this suit, that on August 1, 1958 Arthur S. Flemming was sworn in as his successor, that the new Secretary of Health, Education and Welfare is keeping in effect the determination, ruling or order of the Department of Health, Education and Welfare complained of in the complaint, and, unless otherwise ordered by the court, will continue to do so, and that accordingly there is a substantial need for continuing and maintaining this action, it is by the court this 5th day of September, 1958,

ORDERED that Arthur S. Flemming, Secretary of Health, Education and Welfare be, and he hereby is, substituted as defendant in place of Marion B. Folsom, and that the caption of the case be, and it hereby is, amended accordingly.

F. DICKINSON LETTS
Judge

Consented to:
DAVID REIN
David Rein
Attorney for Plaintiff

JAMES LEE WELDON, JR.
James Lee Weldon, Jr., Department of Justice
Attorney for Defendant, and for
Arthur S. Flemming,
Secretary of the Department of Health,
Education and Welfare.

(File endorsement omitted in printing)

57 IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

(Title Omitted)

**Plaintiff's Motion for Summary Judgment—
Filed October 24, 1958**

Now comes the plaintiff by his attorneys, and pursuant to Rule 56 of the Federal Rules of Civil Procedure, moves the Court to enter summary judgment for the plaintiff on the ground that there is no genuine issue as to any material fact and the plaintiff is entitled to judgment as a matter of law. In support of this motion, plaintiff relies upon the pleadings herein, and on the attached certified copy of the decision of the Board of Immigration Appeals.

DAVID REIN
David Rein

JOSEPH FORER
Joseph Forer
Attorneys for Plaintiff.

CERTIFICATE OF SERVICE (Omitted in printing)

57A

Exhibit to Plaintiff's Motion for Summary Judgment—Decision of Board of Immigration Appeals

U. S. DEPARTMENT OF JUSTICE
BOARD OF IMMIGRATION APPEALS

November 9, 1954

File: E-069450—Los Angeles

In re: DANIEL NESTOR or EPHRAM or PRODAN NESTOROFF

IN DEPORTATION PROCEEDINGS

IN BEHALF OF RESPONDENT: Irwin Gostin, Esquire
6305 Yucca Street
Los Angeles, California

CHARGES:

Warrant: Act of 1952—After entry, an alien who was a member of the Communist Party of the United States

Lodged: None

APPLICATION: Termination of proceedings

DETENTION STATUS: Released on bond

Appeal from order of the special inquiry officer requiring respondent's deportation on the ground stated above.

Appeal is taken on the basis of the unconstitutionality of the statute in question and on the ground that the decision is not based upon reasonable, substantial and probative evidence. Respondent is a 63-year-old married male, native and citizen of Bulgaria, who last entered the United States in 1913. The special inquiry officer found that the record established that respondent had been a voluntary member of the Communist Party from about 1933 to 1939. On advise of counsel, respondent refused to be sworn or to testify.

The evidence of record has been outlined in complete detail by the special inquiry officer. Briefly, membership in the Communist Party is established by testimony of three Government witnessess, Rosser, Kimple and Leech. There has also been introduced into evidence a Communist

Party membership booklet which Kimple identified as belonging to the respondent. Rosser and Leech have placed him at closed meetings of the Communist Party.

In view of the respondent's silence, we find it unnecessary to go into great detail in setting forth our findings concerning counsel's contentions. We have carefully considered these contentions. We believe the following comments are sufficient. Rosser testified he attended two
57B closed meetings of the Communist Party with respondent. His testimony is attacked on the ground that he testified that he saw the respondent at meetings attended by Communists residing in the 61st and 63rd Assembly District, whereas proof was introduced to show that the respondent was not a resident of either district. This contention ignores Rosser's explanation that the closed Communist Party meetings in question, although commonly referred to as being meetings of the 61st and 63rd Assembly District, was attended by Communist Party members of the adjacent 66th Assembly District because there were not too many members in the 66th district (p. 122). We have carefully examined all other contentions concerning Rosser and Leech. We find that the contentions which should be given any weight at all relate to collateral matters and do not subtract substantially from the credibility of the witnesses in the instant proceeding.

Kimple testified that he met respondent in 1937; that he handled the 1938 and 1939 Communist Party registration of the respondent; and that he had handled the respondent's official Communist Party membership book for the year 1938. Kimple testified that he recalled the respondent despite infrequent association with him because of the fact that respondent was the stepfather of Dorothy Ray Healey, a Communist whom Kimple knew well. Kimple stated he knew her as Dorothy Ray Healey between 1936 and 1938, and as Dorothy Connelly about 1938 and 1940. However, the record establishes that Dorothy Ray did not marry Healey until 1941 and did not marry Connelly until 1946. The "discrediting" evidence does not have the weight it might otherwise have had there been competent evidence establishing that Dorothy Ray was not in fact known as Healey or Connelly during the period testified to by respondent; for we note Leech's testimony that "relation-

ships within the Communist Party were very loose and were assumed relationships'' (p. 207). The record bears this out. For example, the testimony reveals that respondent's wife was known as Mrs. Nestor about 1933 and about 1935, although she apparently did not marry respondent until 1936 (pp. 176,207). Nevertheless we have taken the documents relating to Dorothy Ray into consideration in evaluating Kimple's testimony. It is conceded that Dorothy Ray was known by the name witness knew her by and that she is the stepdaughter of the respondent. This one instance of inability to recall the times at which Dorothy Ray assumed the various names (if it is established on this record) when compared with the other evidence of record revealing the strong recollection of the witness diminishes the importance of this incident which moreover concerns a collateral matter.

In attacking Kimple's testimony, counsel has made the point that Kimple, who testified in over 30 previous proceedings, ''could not recall the name of the respondent in 20 of them.'' This is not in accord with the record which clearly reveals that Kimple testified that he believed that he could recall about 20 names and if given the time ''could do a little better than 20'' (p. 65).

57C The combined testimony of the three witnesses and the documentary evidence introduced constitute reasonable, substantial and probative evidence of Communist Party membership. This conclusion was reached without considering the effect of respondent's silence. The respondent's silence is further corroboration of the correctness of the Service contention.

Constitutional objections are not within the jurisdiction of this Board for consideration. The appeal will be dismissed.

ORDER: It is ordered that the appeal be and the same is hereby dismissed.

(Sig) Illegible
Acting Chairman

(File endorsement omitted in printing)

58 IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Division

(Title Omitted)

Defendant's Cross-Motion for Summary Judgment—Filed November 6, 1958

Now comes the defendant, Arthur S. Fleming by his attorneys, and pursuant to Rule 56 of the Federal Rules of Civil Procedure, and upon the pleadings herein, respectfully moves this Honorable Court to enter summary judgment for defendant on the ground that there is no genuine issue as to any material fact and the defendant is entitled to judgment as a matter of law.

ORAN H. WATERMAN
Oran H. Waterman

JAMES LEE WELDON, JR.
James Lee Weldon Jr.

JAMES C. HISE
James C. Hise

Attorneys, Department of Justice
Washington 25, D. C.

Attorneys for Defendant

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59 CERTIFICATE OF SERVICE (omitted)

(File endorsement omitted in printing)

60 IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1154-58

EPHRAM NESTOR, *Plaintiff*

v.

MARION B. FOLSOM, Secretary of Health, Education and Welfare, *Defendant*

Memorandum Opinion—January 13, 1959

FACTS

The plaintiff in this case immigrated to the United States in 1913 from Bulgaria. He was employed in the United States in employment covered by the Social Security Act from December of 1936 until January, 1955. In December of 1955, he filed an application for old age benefits, and he received an award of $55.60 per month effective as of November, 1955.

On July 7, 1956, the plaintiff was deported to Bulgaria pursuant to paragraph (1) of Section 241(a) of the Immigration and Nationality Act. On August 31, 1956, the Attorney General of the United States notified the Bureau of Old Age and Survivors Insurance of the Department of Health, Education and Welfare of the fact that the plaintiff had been deported. The Bureau, pursuant to Section 202(n) of the Social Security Act (Title 42, U.S.C. Sec. 402(n)),[1] suspended payment of plaintiff's old age insurance benefits from and after September, 1956. However, it was through inadvertence that the Bureau did pay benefits to the plaintiff for the month of September, 1956.

The plaintiff's wife, Barbara B. Nestor, was given notice of the suspension of payment of old age insurance
61 benefits in November of 1956. In February of 1957, the plaintiff appointed his wife and Irwin Gostin, an attorney, to represent him in his attempts to have the benefit payments reinstated and paid to him in Sofia, Bulgaria.

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1 See Appendix, *Note 1.*

On January 31, 1958, a decision of a referee of the Department of Health, Education and Welfare was rendered subsequent to a hearing which was held on December 30, 1957, said decision holding that the Bureau properly suspended the payment of benefits to the plaintiff in this case. Following this, on May 5, 1958, plaintiff filed a complaint in this Court for statutory review.

The case is now before this Court on cross-motions for summary judgment, oral argument having been afforded both parties on November 24, 1958.

CONTENTIONS OF PLAINTIFF

The sole issue in this case, according to the plaintiff, is the constitutionality of Section 202(n) of the Social Security Act. He contends that this section of the Act, as applied to him, is unconstitutional. In support of this conclusion, his argument sets forth the following contentions:

1. *Plaintiff is entitled as a matter of right to Social Security Benefits.*

The plaintiff argues that "throughout the history of the Social Security Act, old age insurance benefits have been referred to as a right of the recipient which he has earned and paid for." He also places reliance upon the 1949 Report of House Ways and Means Committee, President Eisenhower's message of January 14, 1954 (100 Cong. Rec., 83rd Cong., 2nd Session, p. 257), remarks of Senator Millikin (100 Cong. Rec., p. 14382) and also upon the remarks of Senator George (102 Cong. Rec., p. 15110),
62 all of which, in effect, state that Social Security benefits are not charity or "a hand-out", but rather are paid to the recipient as an earned right and are related in part to the individual's earnings.

2. *Deprivation of Old Age Insurance Benefits is the imposition of a penalty.*

The plaintiff reasons that benefit payments are derived from contributions of covered workers, their employers and self-employed persons. The payments that he claims under the Act were, in fact, earned through his work and

are assured as a matter of statutory right. However, Congress has adopted an amendment to the Social Security Act which may deprive a person of old age insurance benefits upon conviction of certain crimes and may actually constitute a part of the sentence imposed upon such persion (Title 42 U.S.C., Sec. 402 (u)).[2] Therefore, the plaintiff argues that the withholding of his benefits constitutes a penalty.

In reference to this amendment, the plaintiff's conclusion that such deprivation is a penalty is also based upon letters from the Secretary of Health, Education and Welfare to the Senate Finance Committee on March 28, 1956 (Hearings before the Committee on Finance of U. S. Senate 84th Cong., 2nd Session (pp. 1318-1319))[3] and from the Director of the Bureau of the Budget to the Chairman of the Finance Committee (p. 1342).[4]

Plaintiff also contends that even if the benefits are a gratuity and not a right, he is still entitled to them and that a deprivation is an imposition of a penalty exercised in noncomformity to constitutional standards.

63 3. *Deprivation of Old Age Benefits in this case violated the Constitution.*

The basis for denying to the plaintiff his old age benefits was his deportation which, in turn, was based upon his past membership in the Communist Party. He concedes that deportation based on this activity has withstood constitutional challenge but alleges that the deportation was carried out "solely on the basis that a deportation is not penal in character and is accordingly not subject to the provisions of the ex post facto and bill of attainder clauses of the Constitution, and for the same reason need not conform with the constitutional requirements governing the imposition of a penalty." Consequently, he alleges that the same statute and procedure cannot serve as the basis for the imposition of a penalty. He further alleges that Congress recognized this in 1956 when, by the amendment to the Social Security Act, the imposing of such a

[2] See Appendix, *Note 2.*

[3] See Appendix, *Note 3.*

[4] See Appendix, *Note 4.*

penalty (i.e., deprivation of old age insurance benefits) was provided for upon conviction of certain crimes upon the principle that the deprivation was part of the judicial process and was imposed only after a judicial trial.

Plaintiff contends that Sec. 202(n) of the Social Security Act is invalid as an ex post facto law and as a bill of attainder. He further contends that the statute is against the due process clause of the Fifth Amendment to the Constitution because deprivation of the benefits has no relation to the aims of the Social Security Act and that since the Act, itself, does not require moral character as a condition to eligibility, there is no reason to discriminate against the group of which the plaintiff is a member.

64 Finally, the plaintiff states that the suspension of benefits was based upon his deportation and this, in turn, was based upon his participation in certain activities which he alleges were protected by the First Amendment. In other words, the real basis for his deportation and subsequent suspension of social security benefits was because of activities in which he could legally participate.

Contentions of Defendant

In his opposition to the plaintiff's motion for summary judgment and in support of his cross motion for summary judgment, the defendant alleges that the plaintiff did not have a vested right to receive social security benefits; that suspension of benefits under 202(n) of the Social Security Act is not the imposition of criminal punishment; that the aforesaid section of the Act is constitutional as applied to the plaintiff; and that the findings of fact by the Secretary are supported by substantial evidence and are conclusive.

Purpose of the Act

Counsel for the defendant has emphasized the importance of considering the purpose of the Social Security Act. Although counsel for the plaintiff puts little, if any, emphasis on this, it would be well to briefly inquire into the purpose of this legislation.

The Social Security Act of 1935 "provided a system of old-age insurance for persons working in industry and commerce as a long-run safeguard against the occurrence of old-age dependency." (U.S. Code, Cong. Svc., Vol. 2,

81st Cong., 2nd Sess., 1950, p. 3289). Subsequent revisions and amendments through 1946 dealt generally with provisions for broader coverage supplementary benefits for dependents of the primary beneficiary and determining contribution rates.

Congress, under authority granted to it by the Federal Constitution (Article I, Sec. 8), saw fit to enact this legislation for the general welfare. Mr. Justice Cordozo, in the case of *Helvering* v. *Davis*, (57 S. Ct. 904; 109 A.L.R. 1319, 1324), wrote the following in discussing the Social Security Act:

> "But the ill is all one or at least not greatly different whether men are thrown out of work because there is no longer work to do or because the disabilities of age make them incapable of doing it. Rescue becomes necessary irrespective of the cause. The hope behind this statute is to save men and women from the rigors of the poorhouse as well as from the haunting fear that such a lot awaits them when journey's end is near."

See also: *Ewing* v. *Black*, 172 F.2d 331, 335; *Ray* v. *Social Security Board*, 73 F. Supp. 58, 62.

Insofar as the purpose of the Act may be relevant, it arises in this manner, according to the Government:

> "A condition for the payment of benefits which takes into consideration whether or not the claimant is within or outside the United States is clearly reasonably related to the purpose of the program. The function which Title II of the Social Security Act was designed to serve was to minimize the great and rapidly growing cost of providing for needy aged persons in the United States * * * Certainly it would be pertinent to this purpose to consider, in establishing conditions prequisite to eligibility for benefits, the physical presence or absence of a potential claimant within the United States. A fortiori, it is pertinent and reasonable to condition the payment of benefits so as to exclude payment to an individual who has been deported therefrom." (Points and Authorities of defendant's motion p. 6)

With reference to this contention of the defendant, note must be taken of the following from Vol. 100, Cong.
66 Rec., 83rd Cong. 2nd Session, Jan. 25, 1954, p. 736, wherein Congresswoman Mrs. St. George quotes from a letter received by her from the Secretary of Health, Education and Welfare: "As you know, neither United States Citizenship or residence in the United States are requirements for receipt of old-age survivors insurance benefits.

"In 1939, a provision which would have prevented the payment of benefits to otherwise eligible persons who live abroad was considered by the Congress but was not included in the law."

The foregoing statement was relative to a short remark of Mrs. St. George dealing with people who work in the United States and become eligible for old-age pensions and then return to their country of origin. She commented that in some countries it was possible for a foreign national residing in one of these countries to collect old-age pensions from the United States as well as from his own country. She deemed it necessary that legislation to prevent "a rather obvious abuse of the intention of the law should be considered." Congress, in 1956, added subsection (t) to Sec. 402, Title 42, entitled, "Suspension of benefits of aliens who are outside the United States."

The plaintiff, however, contends that the purpose of the Act is immaterial as applied to him. He says that the right of a worker to social security benefits is an earned right and a deprivation of the benefits is a deprivation of property to which he is entitled, and to deprive him of such benefits is in the nature of an imposition of a penalty and as such must conform with constitutional requirements. In other words, when a person meets the requirements of the Act so as to be eligible for benefits, at that time he comes into possession of an accrued right, or a prop-
67 erty right, and as such, these benefits may then be taken away only in conformance with constitutional requirements.

Nature of the Benefits and Power of Congress

At this point it becomes necessary to determine as far as possible the nature of the benefits conferred under the Social Security Act. Briefly, the fund from which such

payments are made was created pursuant to Title 42, U.S.C. 401.[5] The fund itself is made up of taxes which are paid by employees and employers, these taxes being compulsory for the most part. As a practical matter, the monies which supply this fund rarely come under the control of the person from whose wages they are deducted.

In order to be eligible for reception of these benefits, the Act sets forth three conditions precedent. (See Sec. 402(a))[6] Accordingly, once these conditions are fufilled, the applicant then becomes entitled to benefits. The plaintiff in the present case fulfilled the statutory requirements in December of 1955 and he was awarded monthly benefits effective in November of 1955.

The defendant asserts that the right to benefits conferred pursuant to the statute is a creative right—that is, a statutory conditional right—which the Congress of the United States has the power to alter or terminate. In support of his position, the defendant cites the case of *Ewing* v. *Risher*, 176 F. 2d 641, 10th Cir. (1949) and *Norman* v. *B & O RR Co.*, 294 U.S. 240, 308. The *Ewing* case involved a situation whereby a widow's claim for a lump-sum payment of death benefits was denied on the ground that the claim was not filed within two years
68 of the date of her husband's death, and her claim for widow's insurance benefits was allowed for a shorter time than she claimed because of her failure to file a timely application therefor. The Court at page 644, wrote:

> "* * * The rule is well settled that where a statute creates a right, such as the one in this case, unknown to the common law and limits the time within which the right must be asserted, the limitation defines and controls the right and the right ceases to exist if not asserted within the time fixed in the statute therefor."

Although the above-cited case lends support to the contention of the defendant as to the nature of the benefits conferred, it is readily distinguishable in certain aspects from the present case. The cited case dealt exclusively with the fulfillment of certain conditions precedent as pre-

[5] See Appendix, *Note 5.*

[6] See Appendix, *Note 6.*

scribed by statute, whereas in the present case these conditions precedent were fulfilled, and it is the termination of benefits that is being contested.

In the case of *Ewing* v. *Gardner*, 185 F. 2d 781, the appellee, executor of the estate of the decedent brought an action for primary insurance benefits under the Social Security Act. The claim had been disallowed because the wage earner had failed to furnish the required proof of age at the time he filed his application for benefits. The Social Security Administration awarded the appellee a lump sum death payment but ruled that the appellee as executor was not entitled to receive primary insurance benefits under the Act. The District Court held that the appellee was entitled to recover from the appellant the primary insurance benefits. An appeal followed, and at page 783, the Court stated:

"• • • when the application was filed the three conditions or facts necessary under the statute to entitle
69 the wage earner to receive the monthly primary insurance benefit actually existed. His right to the monthly primary insurance benefit accrued at that time. • • • In the absence of an express provision in the statute to the contrary, the furnishing of such proof is a condition precedent to payment, but not to liability."

And at page 784:

"• • • The right of the wage earner to the primary benefit is not a gratuity, but is a property right which can be enforced by court action. Dismuke vs. U.S., 297 U.S. 167, 170; Lynch vs. U.S., 292 U.S. 571."

The holdings of the courts on this point have not, however, been uniform. For example, in the case of *Roston* v. *Folsom*, 158 Fed. Supp. 112, 120, the Court stated:

"It is beyond reason to refer to Social Security benefits as property rights to which one might succeed."

In the same case, there is the following at page 121:

"Social Security is in the nature of insurance. The terms 'insured', 'insurance', and 'beneficiary' are used

throughout the act. The retirement benefits are similar to an annuity; the survivor benefits resemble insurance."

In the case of *Broderick* v. *Squire*, 163 F. 2d 980, the main question presented was whether an employer-employee relationship existed between the appellant and real estate brokers. The Court at page 981 said:

"The Social Security Act, 42 USCA § 301, et seq. was enacted in 1935 to solve the problem of insecurity brought on by old age and unemployment. The method is to provide for payments in the nature of annuities to the elderly and compensation to the unemployed. U.S. vs. Silk, and Harrison vs. Greyvan Lines, 67 S. Ct. 1463, 91 L. Ed. —. Revenue is obtained from the collection of employment taxes."

In connection with a review of the authorities relating to the nature of the benefits conferred by the Social Security Act, one must also consider the power of Congress to alter, repeal or amend the Act. The position of
70 the defendant may be stated simply as this: Congress created this right to benefits—it was a right unknown to the common law, that is, it is a creative or statutory right, and as such Congress may make changes in the Social Security Act and in the rights thereunder from time to time as it sees fit.

In support of this position, the defendant relies upon the fact that Congress from the time of the enactment of the original Act expressly reserved to itself "the right to alter, amend or repeal any provision of this Act * * *." (Title 42, U.S.C., Sec. 1304). The defendant also cites the case of *Mullowney* v. *Folsom*, 156 Fed. Supp. 34. In that case, the claimant became entitled to benefits as of April, 1950. At this time, and up until January 1, 1951, "earnings from self-employment did not affect either benefits payable under the Act or deductions therefrom." (p. 35). Then, on January 1, 1951, an amendment to the Act became effective which amendment "deprived him of Social Security payments by reason of his earnings as a self-employed real estate broker in excess first of $50 a month, and later $75 a month." (p. 35).

The question then presented was whether the plaintiff had a vested right to receive Social Security benefits as of April, 1950 which could not be adversely affected by legislation passed subsequent to that date.

The Court, in granting the motion of the defendant for summary judgment, wrote the following:

> "Social Security payments are made out of the general treasury and are financed by collections made from both employers and employees * * *
>
> "Payments made as a result of Congressional appropriation have not been thus far construed as contractual in their nature * * *
>
> "* * * The statute provides (Title 42, U.S.C., § 1304) as follows:
>
> 'The right to alter, amend, or repeal any provision of this chapter is reserved to the Congress,'
>
> "* * * It results from all the foregoing considerations that in the opinion of this Court, Edward Mullowney did not acquire a vested right in the Social Security payments allotted to him according to the terms of the Certificate to which reference has been made (and as they might be increased), which rendered them immune from the further exercise of Congressional control, pursuant to the terms of the Statute above quoted."

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It appears well at this point to consider the question, namely: To what extent are the rights of public employees who are within the coverage of a statutory pension system vested, so as to render invalid, legislation repealing or modifying the provisions of the pension statute. Although Social Security benefits do not equate, per se, to pension plan payments, in determining the nature of Social Security benefits it has been shown that they are similar to annuities. Annuities, pensions and Social Security benefits are similar in certain characteristics. The recipient under each plan receives payment of benefits usually at the time of his retirement. Also, the sources from which payments are made are composed essentially in the same manner—that is, by contributions, be they voluntary or involuntary. Thus, in determining to what extent the rights of beneficiaries under any system are

vested, a study of these rights under a statutory system (pensions) now seems appropriate. The question is discussed at great length in 52 A.L.R. 2d 440, with a state by state analysis. The following appears at page 443:

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"§. 3. Federal Decisions (in cases involving federal state and territorial pension statutes)

"The decisions of the federal courts, both in cases involving state statutes providing for pensions for public employees, and in cases involving similar federal and territorial enactments, support the general rule that a pension granted by a public authority is not a contractual obligation, but is a gratuitous allowance, in the continuance of which the pensioner has no vested right; accordingly, the pension is terminable or alterable at the will of the grantor.

"• • • The federal courts have held that the rule that a pensioner has no vested right in the pension is applicable to pension systems under which participating employees are required to contribute, on either a voluntary or compulsory basis." (Citing cases in footnotes 4 and 5).

"But an exception to the rule that a pensioner has no vested right in a pension has been drawn in the case of particular pension payments which have become due; the federal courts hold that the pensioner has a vested right in such payments." (Citing cases in footnote 6)

Thus far it is seen that previous decisions of courts have approved the power of legislatures to revise upward or downward payments under pension plans, retirement acts, etc. The most important feature behind this fact is that these revisions were held to be lawful and thus not inconsistent with any provision of the Constitution. Or, as stated in *Constitution of the United States of America* by Corwin (p. 857):

"Rights created by statutes are subject to qualification by Congress; benefits conferred gratuitously may be redistributed or withdrawn at any time (U.S. ex rel Burnett v. Teller, 107 U.S. 64, 68 (1883)."

However, the plaintiff contends that even if the benefits conferred under the statute are deemed to be a gratuity and not an earned right, the deprivation of them still must conform to constitutional requirements. In support of this contention, he relies upon the case of *Steinberg* v. *U.S.*, 163 F. Supp. 590. In that case, the plaintiff retired on February, 1951 and began to receive an annuity under the Civil Service Retirement Act (5 U.S.C., § 691). Subsequently, in September of 1954, he was subpœnæd before a Federal Grand Jury in New York, at which time he invoked the protection of the Fifth Amendment of the Constitution of the United States. The plaintiff was later advised by the defendant that his annuity was temporarily suspended and later this became permanent, such action being pursuant to Title 5, U.S.C. § 704(d).[7] The plaintiff then filed an action claiming that § 740(d) did violence to his rights as a citizen of the United States under the Constitution. The Court by a Decision of three to one granted the motion of the plaintiff for summary judgment.

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Judge Laramore held that the:

> "* * * right of a federal employee to an annuity is not born of a contractual relationship * * * but is more in the nature of a gratuity granted in appreciation for long and faithful service. Congress may in its wisdom modify the payments upward or downward without impairing the obligation of a contract. * * * Although an annuity is paid for past as distinguished from present services, the legal relationship between the parties is in all material respect parallel since a current Federal employee neither has a vested or contractual right to continued employment. Even so, the Supreme Court has said 'that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory. *Wieman* v. *Updegraff*, 344 U.S. 183. Thus we are squarely met with the question as to whether or not it is arbitrary and discriminatory for the Federal government to exclude persons from its annuity rolls who have availed themselves of the protection provided for in the Fifth Amendment."

[7] See Appendix, *Note 7.*

He held that upon the basis of Supreme Court decisions
"such a law is an indiscriminate classification of
74 the innocent with the guilty and must fall as an assertion of arbitrary power." (page 592).

Continuing, Judge Laramore wrote:

> "Furthermore, an act of Congress applying to persons such as plaintiff which inflicts punishment without a judicial trial is a bill of attainder prohibited by the Constitution. U.S. vs. Lovett, 328 U.S. 303; Cummings vs. State of Missouri, 4 Wall. 277; Ex Parte Garland, 4 Wall. 333. In this case the punishment inflicted by the Act was the denial of his annuity without due process. A bill of attainder is a legislative act which inflicts punishment without a judicial trial. If the punishment be less than death, the act is termed a bill of pains and penalties which within the meaning of the Constitution is a bill of attainder. Cummings vs. State of Missouri, supra. Notwithstanding that plaintiff had no vested or contractual right to his annuity, we believe that Congress in prescribing a punishment for persons who exercise a constitutional right has acted beyond the scope of the Constitution."

Judge Whitaker concurred in the result reached by the majority but viewed the case in a somewhat different light. He held, notwithstanding the case of *Dodge* vs. *Board of Education*, 302 U.S. 74 and cases subsequent to that case, that, "A federal employee who has retired from the service has a vested right in the retired pay to which he was entitled at the time of his retirement."

Also,

> "When an employee enters the government service he does so relying upon the statute or regulations fixing the current compensation of the office and the amount to which he will be entitled upon retirement. So long as he remains in the government service, Congress of course has the right to change the compensation to be paid to the holder of the office, as well as the retired pay to which he will be entitled upon retirement. The employee takes the office with knowledge,

actual or constructive, of the power of Congress to do this. But after the employee has rendered the services required of him by the Government and severs his connection with the Government, he then becomes entitled to the retired pay in effect at the time of his retirement.

75 "This, I think, is a vested right, because it is compensation for services already rendered. Retired pay is * * * a part of the emoluments of the office."

Judge Whitaker then proceeded to strengthen his view first by an interpretation of Title 4, U.S.C. 401, carried in Title 5, U.S.C. 2254(b),[8] and second, by reference to a number of cases which hold that a person has such a vested right to retirement benefits. (52 A.L.R. 2d 437). He admits that "the decisions of the Federal courts are in the other direction." (p. 595). In his comment on the case of *Dodge* v. *Board of Education, supra,* he writes:

> "I concede full power in the legislature to reduce retired benefits to people on the payroll when the Act was passed, but I deny the power of the legislature to reduce retirement benefits to people who have severed their connection with the Government; in other words to people who have already earned the retired pay in effect at the time of their retirement." (P. 595)

In another case with which he deals in his opinion, *MacLeod* v. *Fernandez,* 101 F. 2d 20, cert. den. 308 U.S. 561, which "expressly held that the retired pay of a retired employee could be reduced by a law passed after the date of his retirement," (p. 596), Judge Whitaker states:

> "I do not agree with the decision in that case. If I am correct in saying that the retired pay is not a pension or a gratuity, but is compensation for services already rendered, then I think an employee's right to this retired pay does become vested at the time of his retirement.
>
> "If this view is correct, Congress has taken this vested right without due process of law. I do not think this

[8] See Appendix, *Note 8.*

can be gainsaid and, hence, I do not enlarge upon it." (P. 596).

Chief Judge Jones, while concurring, touches upon an aspect of the case which the other judges did not
76 treat. He states that the United States Government has many obligations calling for the payment of money; the courts determine what obligations exist and their extent thereof, but the power to pay or authorize their payment rests solely in Congress. He writes:

> "If Congress, therefore, chooses to withhold appropriations to pay the government's obligations, or any of them, it is not within the province of the courts to pass upon the wisdom of that decision, nor is it within their power to compel Congress to do otherwise." (Page 593).

He held in regard to retirement benefits that there is a definite contractual relationship which certainly becomes effective upon retirement but that with regard to pensions or gratuities, there is neither a contractual relationship nor a vested right and that Congress may reduce the amount from time to time.

In discussing the Act of Congress in the above-cited case, Chief Judge Jones wrote:

> "* * * But if by the act in the present case, Congress has merely withheld payment by restriction on appropriation or by a refusal to appropriate, the obligation of the United States to the plaintiff stands unimpaired, though unpaid. If this is all the act accomplishes there is nothing to prevent the present or a future Congress from recognizing the obligation to plaintiff by appropriation and payment and neither is there anything to prevent this court from entering judgment in favor of the plaintiff for the amount of the obligation without determining constitutional questions." (Page 593).

In conclusion, he wrote:

> "* * * If the act be construed as an intention on the part of Congress to destroy a right which became vested at the time of retirement, it would be invalid.

But on the other hand if, as seems likely, the intention of the Congress was merely to decline to make an appropriation so long as the condition existed, such action was clearly within the scope of its authority."

77 As seen in the *Steinberg* case, *supra,* different approaches were taken by the different judges in forming a basis for their decisions. However, there was near unanimity on one point, that being that the statute was an arbitrary and unreasonable discrimination between employees who have availed themselves of a constitutional guarantee and those who have not used this guaranteed protection. Judge Madden in his dissent did not agree with this conclusion however.

Is the statute (Title 42 U.S.C. 402(n)) in the present case arbitrarily and unreasonably discriminating. The basis for discrimination is that any one who has been deported under certain paragraphs of Sec. 1251(a) of Title 8, U.S.C. is deprived of his benefits as opposed to those who have not been deported and thus not deprived of their benefits.

From the foregoing, it would be only reasonable to accept the fact that Congress has the right or power to make such amendments and repeals as are necessary from time to time. This is especially true when one realizes that the Act itself deals with what had been, and may even still be, the economic needs of a continually increasing portion of the population. Since the Act deals to a substantial extent with the economy of our nation, a casual glance at the economic history of the country reveals that many fluctuations, some minor, some extreme, have occurred, and it is only reasonable to assume that they will occur in the future.

However, to say that Congress has the right through its legislative enactments to cope with certain problems that may continually arise and that are relative to the purpose for which the Act was passed is one thing, but it is an entirely different thing to say that Congress while legislating and purportedly in accordance with the basic

78 designs and purposes for which the Act was originally passed, can or may deprive a person of a property right is quite another matter. For, as Judge

Whitaker points out in the case of *Steinberg* v. *U. S.*, *supra*, at page 595:

> "* * * If I am correct in saying that the retired pay is not a pension or a gratuity but is compensation for services already rendered, then I think an employee's right to this retired pay does become vested at the time of his retirement.
>
> "If this view is correct, Congress has taken this vested right without due process of law. I do not think this can be gainsaid and, hence, I do not enlarge upon it."

It has been seen from the foregoing authorities that Congress may validly revise or alter payments to beneficiaries of pension systems. Their power to reduce payments or to impose conditions to their payment has also been upheld. However, must it logically follow that because Congress has the power to exercise such revision or alteration that it may also completely deprive one of such benefits after they have fully accrued? This Court does not believe so.

As seen previously, the basic conflict is between the power of Congress to legislate in this field and the right of a person to an accrued property right. Prior decisions reveal, although not unanimously, that the nature of such benefits make them property rights, but property cannot be taken from a person without due process of law, that is, 'law of the land.'

This Court concludes that the plaintiff was not afforded due process of law in being deprived of his benefits through a legislative enactment which took such benefits be-
79 cause of deportation. The Court grants the plaintiff's motion for summary judgment.

Counsel will submit a proper order.

EDWARD A. TAMM

Dated: 1/13/59

Note 1. Title 42 U.S.C., Sec. 402—*Termination of benefits upon deportation of primary beneficiary.*

(n)(1)If any individual is (after the date of enactment of this subsection) deported under paragraphs (1), (2), (4), (5), (6), (7), (10), (11), (12), (14), (15), (16), (17), or (18) of section 1251(a) of Title 8 then, notwithstanding any other provisions of this subchapter—

(A) no monthly benefit under this section or section 423 of this title shall be paid to such individual, on the basis of his wages and self-employment income, for any month occurring (i) after the month in which the Secretary is notified by the Attorney General that such individual has been so deported and (ii) before the month in which such individual is thereafter lawfully admitted to the United States for permanent residence.

(B) if no benefit could be paid to such individual (or if no benefit could be paid to him if he were alive) for any month by reason of subparagraph (A), no monthly benefit under this section shall be paid, on the basis of his wages and self-employment income, for such month to any other person who is not a citizen of the United States and is outside the United States for any part of such month, and

(C) no lump-sum death payment shall be made on the basis of such individual's wages and self-employment income if he dies (i) in or after the month in which such notice is received, and (ii) before the month in which he is thereafter lawfully admitted to the United States for permanent residence.

Section 403(b) and (c) of this title shall not apply with respect to any such individual for any month for which no monthly benefit may be paid to him by reason of this paragraph.

(2) As soon as Practicable after the deportation of any individual under any of the paragraphs of section 1251(a) of Title 8 enumerated in paragraph (1) of this subsection, the Attorney General shall notify the Secretary of such deportation.

Note 2. Title 42 U.S.C. Sec. 402—*Conviction of subversive activities, Etc.*

(u)(1) If any individual is convicted of any offense (committed after August 1, 1956) under

(A) chapter 37 (relating to espionage and censorship), chapter 105 (relating to sabotage), or chapter 115 (relating to treason, sedition, and subversive activities) of Title 18, or

81 (B) section 783, 822 or 823 of Title 50,

Then the court may, in addition to all other penalties provided by law impose a penalty that in determining whether any monthly insurance benefit under this section or section 423 of this title is payable to such individual for the month in which he is convicted or for any month thereafter, and in determining the amount of any such benefit payable to such individual for any such month, there shall not be taken into account

(C) any wages paid to such individual or to any other individual in the calendar quarter in which such conviction occurs or in any prior calendar quarter, and

(D) any net earnings from self-employment derived by such individual or by any other individual during a taxable year in which such conviction occurs or during any prior taxable year.

(2) As soon as practicable after an additional penalty has, pursuant to paragraph (1) of this subsection, been imposed with respect to any individual, the Attorney General shall notify the Secretary of such imposition.

(3) If any individual with respect to whom an additional penalty has been imposed pursuant to paragraph (1) of this subsection is granted a pardon of the offense by the President of the United States, such additional penalty shall not apply for any month beginning after the date on which such pardon is granted.

Note 3.

Excerpts of letter from Secretary of Health, Education and Welfare to the Senate Finance Committee of March 28,

1956. (Hearings before the Committee on Finance of the U. S. Senate, 84th Congress, Second Session, on Social Security Amendments for 1955; p. 1318-1319)

"An individual establishes rights to benefits under the old-age and survivors insurance program by working in employment or self-employment covered by the law and paying social security contributions on his earnings. The costs of benefits and administration are met in their entirety from the contributions of covered workers, their employers and self-employed persons. There is no contribution from general tax revenues.

* * *

"* * * if benefit rights of persons convicted of
82 these crimes were terminated, a worker insured under old-age and survivors insurance would suffer a greater punishment than an individual whose work was in noncovered employment or who was not dependent on earnings from employment for his support. The punishment would be one that would last for the rest of the individual's life * * *

"As in the case of private pension and group insurance payments and as in the case of wages and salaries, benefits under old-age and survivors insurance are work-connected payments. It is this work connection—the fact that they are earned through work—that establishes the basic character of the benefits. Hence, under present law benefits are paid to an insured worker and his eligible dependents or survivors without taking into account his attitudes, opinions, behavior, or personal characteristics. The right to benefits having been earned, the individual's actions do not modify or restrict that right.

"Because the deprivation of benefits as provided in the amendment is in the nature of a penalty and based on considerations foreign to the objectives and provisions of the old-age and survivors insurance program, the amendment may well serve as a precedent for extension of similar provisions to other public programs, and to other crimes which, while perhaps different in degree, are difficult to distinguish in principle."

Note 4. Excerpts of letter from the Director of the Bureau of the Budget to the Chairman of the Finance Committee. (Hearings before the Committee on Finance of the U. S. Senate, 84th Congress, 2nd Sess., on Social Security Amendments for 1955, p. 1342).

"It has always been stressed by the Congress that old age and survivors insurance is not a Federal bounty, but rather a separate self-financed system of insurance, the costs of which are shared equally by employer and employee; that benefits are assured as a matter of statutory right; that the Federal Government is merely a trustee of the system and not a contributor; and that certain benefits are available to surviving dependents of an insured individual without any rights of election or other voluntary action on the part of the insured wage earner. The proposed amendment does not seem consistent with these principles * * *

"A further question involves the retroactive character of the amendment, since it would deny benefits based on contributions predating its enactment. This raises a legal and policy question as to the propriety of such retrospective action which should be resolved only after careful analysis extending to the whole range of civil disabilities and penalties which may be imposed on individuals convicted of the particular crime."

83 *Note 5.* Title 42 U.S.C. Sec. 401—*Federal old-age and survivors insurance trust fund and Federal disability insurance trust fund.*

(a) There is created on the books of the Treasury of the United States a trust fund to be known as the "Federal Old-Age and Survivors Insurance Trust Fund." The Federal Old-Age and Survivors Insurance Trust Fund shall consist of the securities held by the Secretary of the Treasury for the Old-Age Reserve Account and the amount standing to the credit of the Old-Age Reserve Account on the books of the Treasury on January 1, 1940, which securities and amount the Secretary of the Treasury is authorized and directed to transfer to the Federal Old-Age

and Survivors Insurance Trust Fund, and, in addition, such amounts as may be appropriated to, or deposited in, the Federal Old-Age and Survivors Insurance Trust Fund as hereinafter provided * * *"

Note 6. Title 42 U.S.C. Sec. 402. *Old Age and survivors insurance benefit payments—*

Old Age insurance benefits.

(a) Every individual who

(1) is a fully insured individual (as defined in section 414(a) of this title),

(2) has attained retirement age (as defined in section 416(a) of this title), and

(3) has filed application for old-age insurance benefits or was entitled to disability insurance benefits for the month preceding the month in which he attained the age of 65, shall be entitled to an old-age insurance benefit for each month, beginning with the first month after August 1950 in which such individual becomes so entitled to such insurance benefits and ending with the month preceding the month in which he dies. Except as provided in subsection (q) of this section, such individual's old-age insurance benefit for any month shall be equal to his primary insurance amount (as defined in section 415(a) of this title) for such month.

Note 7. Title 5 U.S.C. Sec. 740(d)

There shall not be paid to any person who has failed or refused, or fails or refuses, prior to, on, or after the date of enactment of this Act, upon the ground of self-incrimination to appear, testify, or produce any book, paper, record, or other document, with respect to his service as an officer or employee of the Government or with respect to any relationship which he has had or has with a foreign government, in any proceeding before a Federal grand jury, court of the United States, or congressional committee, or to the survivor or beneficiary of such person, for any period subsequent to the date of such failure or refusal of such person or the date of enact-

ment of this Act, whichever is later, any annuity or retired pay on the basis of the service of such person as a officer or employee of the Government.

Note 8. Title 5 U.S.C. 2254(b) *Consent to deductions.*

Each employee or Member shall be deemed to consent and agree to such deductions from basic salary, and payment less such deductions shall be a full and complete discharge and acquittance of all claims and demands whatsoever for all regular services during the period covered by such payment, except the right to the benefits to which he shall be entitled under this chapter, notwithstanding any law, rule or regulation affecting the individual's salary.

(File endorsement omitted in printing)

85 IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1154-58

EPHRAM NESTOR, *Plaintiff*,

v.

ARTHUR S. FLEMMING, *Defendant*.

Order Pursuant to Memorandum—January 21, 1959

The above action came on before the Court on cross-motions for summary judgment. The Court having considered the pleadings in the case, the entire record including the record of the administrative proceedings before the Social Security Administration, and the briefs filed by the parties, and having heard argument in open court, and having filed an opinion on January 14, 1959, which opinion constitutes this Court's findings of fact and conclusions of law, it is by the Court this 21st day of January, 1959,

ORDERED, ADJUDGED and DECREED:

1. That defendant's motion for summary judgment be, and it is hereby, denied.

2. That plaintiff's motion for summary judgment be, and it is hereby, granted.

3. That the Determination of October 25, 1956 terminating the payment of social security benefits to the plaintiff is illegal, and it hereby is set aside, and the Determination of Award of Benefits to the plaintiff made on March 7, 1956, be, and it hereby is, reinstated.

4. That the defendant, Arthur S. Flemming, Secretary of Health, Education, and Welfare, pay or cause to be paid to the plaintiff or to his duly authorized agent all benefits that may have accrued to the plaintiff under the Determination of Award of Benefits made on March 7, 1956, and all benefits that may accrue to him in the future pursuant to said Determination.

86 5. That the clerk of the Court be, and he is hereby authorized and directed to return the cash security for costs of $50.00 deposited by the plaintiff by drawing and delivering a check for the same to plaintiff's attorney, David Rein, 711 Fourteenth Street, N. W., Washington, D. C.

EDWARD A. TAMM,
Edward A. Tamm, *Judge*

(File endorsement omitted in printing)

87 IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Division

Civil Action No. 1154-58

EPHRAM NESTOR, Bul. Rusky No. 5, Sofia, Bulgaria,
Plaintiff,

v.

ARTHUR S. FLEMMING, Secretary of Health, Education and Welfare, Washington, D. C., *Defendant*.

Amended Order of February 20, 1959

Upon consideration of defendant's Motion to alter and amend the final order of this Court, dated January 21, 1959, which decreed

"1. That defendant's motion for summary judgment be, and it is hereby, denied.

"2. That plaintiff's motion for summary judgment be, and it is hereby granted.

"3. That the Determination of October 25, 1956 terminating the payment of social security benefits to the plaintiff is illegal, and it hereby is set aside, and the Determination of Award of Benefits to the plaintiff made on March 7, 1956, be, and it hereby is, reinstated.

"4. That the defendant, Arthur S. Flemming, Secretary of Health, Education, and Welfare, pay or cause to be paid to the plaintiff or to his duly authorized agent all benefits that may have accrued to the plaintiff under the Determination of Award of Benefits made on March 7, 1956, and all benefits that may accrue to him in the future pursuant to said Determination.

"5. That the clerk of the Court be, and he is hereby
88 authorized and directed to return the cash security for costs of $50.00 deposited by the plaintiff by drawing and delivering a check for the same to plaintiff's attorney, David Rein, 711 Fourteenth Street, N. W., Washington, D. C."

it is this 20th day of February, 1959,

ORDERED, that the foregoing Order of January 21, 1959, be and the same hereby is amended by striking therefrom paragraph numbered 4 thereof.

F. DICKINSON LETTS
F. Dickinson Letts
United States District Judge.

Consented to this 4th day of February, 1959:

DAVID REIN
David Rein
Counsel for Plaintiff.

JAMES C. HISE
James C. Hise
Counsel for Defendant.

(File endorsement omitted in printing)

89 IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1154-58

EPHRAM NESTOR, *Plaintiff*,

v.

ARTHUR S. FLEMMING, Secretary of Health Education and Welfare, *Defendant*

Notice of Appeal to the Supreme Court of the United States—Filed February 20, 1959

I. Notice is hereby given that Arthur S. Flemming, Secretary of Health, Education and Welfare, the defendant above named, hereby appeals to the Supreme Court of the United States from the final order granting plaintiff's motion for summary judgment, entered in this action on January 21, 1959, as amended on February 20, 1959.

This appeal is taken pursuant to 28 U.S.C. § 1252.

* * * * * * * * * *

90 III. The following question is presented by this appeal:

Whether an alien who has been awarded and has commenced to receive monthly social security benefits under Title II of the Social Security Act (42 U.S.C. §§ 401-425) has a vested or "property" right to the continued receipt of such benefits, of such a nature that the suspension of such payments, pursuant to express statutory direction, following his deportation from this country deprives him of property without due process of law, where the statute commanding such suspension (*viz.*, Section 202(n) of the Social Security Act, as amended, 42 U.S.C. (Supp. V) § 402(n), providing in substance that no monthly social security benefit shall be paid to any person who has been deported under any of various designated paragraphs of Section 241(a) of the Immigration and Nationality Act, 8 U.S.C. § 1251(a), until his lawful readmittance to the United States for permanent residence) was enacted prior

to the date on which the alien first became eligible for any social security benefits.

JAMES C. HISE
James C. Hise,
Attorney, Department of Justice
Attorney for Arthur S. Flemming,
Secretary of Health, Education and Welfare
Washington 25, D. C.

20th FEBRUARY 1959.

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91 AFFIDAVIT OF SERVICE (omitted)

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92 Clerk's Certificate to foregoing Transcript omitted in printing.

SUPREME COURT OF THE UNITED STATES

(Title omitted)

Order Postponing Jurisdiction—June 22, 1959

APPEAL from the United States District Court for the District of Columbia.

The statement of jurisdiction in this case having been submitted and considered by the Court, further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits.

June 22, 1959

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